

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2007 MSPB 263**

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Docket Number DA-0831-07-0068-R-1

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**Vivian J. Blaha,**

**v.**

**Office of Personnel Management,  
Agency.**

OPM Claim No. CSA 4 171 122

November 8, 2007

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Afton Jane Izen, Esquire, Bellaire, Texas, for the appellant.

Earl A. Sanders, Esquire, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman  
Barbara J. Sapin, Member

**OPINION AND ORDER**

¶1 Pursuant to 5 U.S.C. § 7703(d), the Director of the Office of Personnel Management (OPM) seeks reconsideration of the Board's decision in *Blaha v. Office of Personnel Management*, 106 M.S.P.R. 265 (2007), which remanded the appeal to the Dallas Regional Office for additional fact-finding and issuance of a new initial decision regarding the appellant's attempt to make a belated election of survivor annuity benefits pursuant to 5 U.S.C. § 8339(k)(1). For the reasons set forth below, we DENY the reconsideration request.

### BACKGROUND

¶2 The appellant retired from a Clerk position with the U.S. Postal Service effective January 31, 2004, and elected an annuity payable only during her lifetime. MSPB Docket No. DA-0831-07-0068-I-1, Initial Appeal File (IAF), Tab 5, Subtab 6 at 14. In a February 19, 2006 letter, she sought to change her election to a reduced annuity with a survivor annuity for a person with an insurable interest in her. IAF, Tab 5, Subtab 5. The appellant asserted that, when she retired, she was “not offered the opportunity to participate in the Insurable Interest benefit, nor was I aware of it.” *Id.* In both an initial and reconsideration decision, OPM denied her request. *Id.*, Subtabs 2, 4. The appellant then appealed to the Board and requested a hearing. IAF, Tab 1.

¶3 During a prehearing conference, the administrative judge informed the parties that *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990), appeared to apply to the case and that *Richmond* held that the government cannot be estopped from denying benefits not otherwise permitted by law, even if the claimant was denied monetary benefits due to reliance on the mistaken advice of a government official. IAF, Tab 7. The parties stipulated that, at the time of her retirement, the appellant was told by a Postal Service retirement counselor that she could not elect a survivor annuity for her domestic partner of 15 years and was not told that her domestic partner would qualify for a survivor annuity as an individual with an insurable interest in the appellant. *Id.*, Tabs 6, 7. Based on the stipulation, the appellant withdrew her request for a hearing. *Id.*, Tab 8. In an initial decision, the administrative judge affirmed OPM’s decision, *id.*, Tab 11, and the appellant filed a petition for review, MSPB Docket No. DA-0831-07-0068-I-1, Petition for Review File, Tab 1.

¶4 In a July 16, 2007 Opinion and Order, the Board noted that, under 5 U.S.C. § 8339(k)(1), “[a]t the time of retiring . . . an employee . . . who is found to be in good health by [OPM] may elect a reduced annuity . . . and name in writing an individual having an insurable interest in the employee . . . to receive an annuity

. . . after the death of the retired employee . . . .” *Blaha*, 106 M.S.P.R. 265, ¶ 7. The Board also noted that, under OPM’s regulations, an individual may make or modify an election within 30 days of the first regular monthly annuity payment. *Id.*; 5 C.F.R. § 831.621. There is no dispute that the appellant tried to change her election more than 30 days after her first regular monthly payment, and thus missed the regulatory deadline for making an election of a survivor annuity.

¶5 In its analysis, the Board relied on its well-established precedent setting forth when a statutory or regulatory deadline may be waived, including that “an agency’s affirmative misconduct may preclude enforcement of the deadline under the doctrine of equitable estoppel, at least where such estoppel would not result in the expenditure of appropriated funds in contravention of statute.” *Blaha*, 106 M.S.P.R. 265, ¶ 8, citing *Wutke v. Office of Personnel Management*, 67 M.S.P.R. 523, 528 (1995); *Speker v. Office of Personnel Management*, 45 M.S.P.R. 380, 385 (1990), *aff’d*, 928 F.2d 410 (Fed. Cir.) (Table) and *modified*, *Fox v. Office of Personnel Management*, 50 M.S.P.R. 602, 606 n.4 (1991). The Board found that “this case is distinguishable from *Richmond* because it does not involve a claim for money from the U.S. Treasury in contravention of law.” *Blaha*, 106 M.S.P.R. 265, ¶ 9.

¶6 Because the parties were not informed of the correct grounds for waiving a filing deadline prescribed by statute or regulation and were not afforded an opportunity to address the issue of whether affirmative misconduct would preclude enforcement of the deadline under the doctrine of equitable estoppel, the Board remanded the case for further adjudication. *Id.*, ¶ 11. The Board also noted that the appellant must show on remand that she acted reasonably in relying on the information provided by the Postal Service retirement counselor. *Id.*

¶7 After the Board’s decision, the Director of OPM filed a request for the Board to reconsider its July 16, 2007 decision.\* MSPB Docket No. DA-0831-07-0068-R-1, Reconsideration File (RF), Tab 1. The Board received the Director’s brief in support of her request on September 5, 2007. *Id.*, Tab 3. Despite being afforded an opportunity to respond to reconsideration request, the appellant did not do so. *See id.*, Tab 2.

### ANALYSIS

¶8 The essence of OPM’s argument on reconsideration is that the *Richmond* decision precludes the application of equitable estoppel to the belated election of an insurable interest survivor annuity. *Id.*, Tab 3. OPM asserts that the fact that such an annuity is “payable only upon the occurrence of a future event does not mean that” the payments are not paid from the Federal Treasury. *Id.* at 17.

¶9 The question of the applicability of equitable estoppel against the government is a complex one that has not been fully resolved. *See Richmond*, 496 U.S. at 423 (stating that “we need not embrace a rule that no estoppel will lie against the Government in any case” and leaving “for another day whether an estoppel claim could ever succeed against the Government.”); *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 60 (1984) (specifically declining to adopt a rule that estoppel may not under any circumstances be applied against the government). The elements necessary to establish equitable estoppel in general are well settled, however. Equitable estoppel is applicable where a party makes false representations to induce another party to act and the second party reasonably relies on the misrepresentation to her detriment. *See Heckler*, 467 U.S. at 59, *quoting*, Restatement (Second) of Torts

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\* The Director of OPM also filed a motion seeking a stay of the Board’s July 16, 2007 decision. *See* MSPB Docket No. DA-0831-07-0068-N-1. The Board denied the request for a stay in a September 11, 2007 decision. *Blaha v. Office of Personnel Management*, 106 M.S.P.R. 494 (2007).

§ 894(1) (1979); 31 C.J.S., Estoppel and Waiver § 58 (Westlaw Database Updated June, 2007). These elements must be present for any equitable estoppel claim to succeed and are a threshold requirement before considering whether the additional elements necessary to estop the government are present. *Heckler*, 467 U.S. at 61 (“however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present.”).

¶10 As discussed above, the Board has remanded the initial appeal to the administrative judge to determine whether affirmative misconduct would preclude enforcement of the election deadline under the doctrine of equitable estoppel. The Board specifically stated that the appellant must show on remand that she acted reasonably in relying on the information provided by the Postal Service retirement counselor. *Blaha*, 106 M.S.P.R. 265, ¶ 11.

¶11 If on remand of the initial appeal, and on any subsequent petition for review of the remand initial decision, it is determined that the elements of equitable estoppel, including reasonable reliance, have not been established by the appellant, then the resolution of the specific question of whether the government can be estopped from denying a belated election of an insurable interest survivor annuity would be moot. The appellant simply could not prevail. Accordingly, a decision addressing OPM’s petition for reconsideration would be an advisory opinion since it would not be relevant to a case or controversy before the Board. The Board is prohibited by statute from issuing advisory opinions. 5 U.S.C. § 1204(h); *McLaughlin v. Office of Personnel Management*, 62 M.S.P.R. 536, 555 (1994), *aff’d*, 47 F.3d 1181 (Fed. Cir. 1995) (Table). In sum, deciding this reconsideration request, the gravamen of which is the applicability of equitable estoppel against the government, would be premature until it is determined whether the basic elements of equitable estoppel are present.

ORDER

¶12           Accordingly, OPM's petition for reconsideration is DENIED. This is the Board's final decision in this case. The Director may now seek judicial review pursuant to 5 U.S.C. § 7703(d).

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.